

before the prize is described to the person called.<sup>139</sup> Such a disclosure will clearly inform consumers that a true, legitimate "prize" awarded in a game of chance does not require any purchase.<sup>140</sup> This disclosure will help dispel the false information provided during fraudulent prize promotions that a consumer must purchase some item in order to win the "fabulous" prize offered. In order to make this "no purchase necessary" disclosure meaningful, the revised proposed Rule also requires the telemarketer to disclose the no-purchase entry method for the prize promotion, if requested by the person called.

(d) Outbound telephone calls that include a premium. The initially proposed Rule required any telemarketing that includes an offer of a premium to make the additional disclosure of the verifiable retail sales price of such premium or comparable item, or a statement that the retail sales price of the premium is less than \$20.00.<sup>141</sup> A number of commenters stated that this Section should be eliminated. They claimed that many premiums offered by legitimate telemarketers generally are not available for retail sale, and attempting to determine a retail sales price may be difficult and costly. They also predicted that this added cost may result in the elimination of premiums being offered, to the detriment of consumers.<sup>142</sup>

The Commission is persuaded by these arguments; in and of itself, non-disclosure of the value of an offered premium is not likely to be injurious to consumers, and imposition of the potential costs associated with such a disclosure requirement is not justified. The prohibition against misrepresentations in Section 310.3 is sufficient to protect consumers against false and misleading claims about the value of a premium.

## 5. Other Required Disclosures

The initially proposed Rule prohibited any seller or telemarketer conducting a prize promotion from requesting or accepting any payment from a person without first providing that person with a written disclosure, in duplicate, and receiving

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<sup>139</sup> NAAG at 28-29.

<sup>140</sup> See e.g., 18 U.S.C. 1301. Additionally, PMAA, stated during the workshop that such a requirement would not be overly burdensome and would accurately distinguish deceptive prize promotions from legitimate prize promotions. Tr. at 608-10 (PMAA).

<sup>141</sup> Initially proposed Rule Section 310.4(d)(4).

<sup>142</sup> See, e.g., MPA at 22-23; NAA at 19-20; MasterCard at 13-14; MBNA at 1.

from that person a written acknowledgement that the person has read the disclosure.<sup>143</sup> Numerous commenters stated that such a written acknowledgement requirement would effectively ban prize promotions in telemarketing sales by increasing costs and negating the efficiency of those sales.<sup>144</sup> The Commission is persuaded that such an outcome would limit consumers' choices and would be inconsistent with Commission policy. Prize promotions in telemarketing, in and of themselves, are not deceptive, do not cause injury to consumers, and may, in fact, provide consumer benefits. The Commission has determined that these requirements would likely produce nominal consumer benefits that would be outweighed by the potential detrimental effects, and has therefore dropped them from the revised proposed Rule.

The initially proposed Rule also imposed written disclosure requirements on investment opportunities very similar to those for prize promotions. Specifically, any seller or telemarketer selling an investment opportunity was prohibited from requesting or accepting any payment from a person without first providing that person with a written disclosure, in duplicate, and receiving from that person a written acknowledgement that the person had read the disclosure.<sup>145</sup> Industry representatives again stated that a signed acknowledgement from consumers is unjustifiably burdensome in advance of all investment transactions.<sup>146</sup> They also stated that the delay caused by this requirement is unfair to both the customer and the seller in certain volatile markets.<sup>147</sup>

After reviewing the comments in this area, and upon further reflection, the Commission, for reasons similar to those that prompted deletion of the written prize promotion disclosures, has deleted requirements for additional written disclosures for telemarketing investment opportunities. While the Commission is mindful that both prize promotions and investment opportunities

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<sup>143</sup> Initially proposed Rule Section 310.4(e)(1).

<sup>144</sup> See, e.g., DMA at 33; MPA at 23-24; NRF at 38; PMAA at 49-51; CUCI at 10; IBM at 26; ITI at 8-10; Spiegel at 5-6; ADS at 3; SDRA at 1. In fact, one commenter noted that 73 percent of prize winners do not return an affidavit permitting the distribution of prizes to them. DW&Z at 2.

<sup>145</sup> Initially proposed Rule Section 310.4(e)(2).

<sup>146</sup> See, e.g., A-Mark at 2, 11-12; AFSA at 7-8.

<sup>147</sup> See, e.g., Monex at 16-17.

are a major area of telemarketing fraud,<sup>148</sup> the costs imposed on legitimate industry by these mandatory disclosures is not justified. In addition, the prohibitions on misrepresentations, as well as the disclosures required before a customer pays for goods or services, included in Section 310.3 are sufficient to prohibit the deceptive conduct found in the telemarketing of prize promotions and investment opportunities.

#### 6. Distribution of Lists.

The initially proposed Rule prohibited any person who is subject to any federal court order resolving a case in which the complaint alleged a violation of certain provisions of the Rule, and in which the court did not dismiss or strike all such allegations from the case, from selling, renting, publishing, or distributing any list of customer contacts from that person.<sup>149</sup> Industry commenters stated that the original proposal was too great a penalty for Rule violations, would preclude settlements of law enforcement actions, and should be eliminated.<sup>150</sup> On the other hand, law enforcement and consumer representatives commented that the proposed provision does not go far enough, and should extend to all rule violations and to FTC enforcement actions.<sup>151</sup>

After considering the comments, the Commission believes that such a prohibition is better left to the discretion of law enforcement agencies to seek, and the courts to order, in individual law enforcement actions. This Section therefore has been deleted from the revised proposed Rule.

#### *Section 310.5 Recordkeeping Requirements*

The initially proposed Rule required any seller or telemarketer to keep certain records relating to telemarketing activities for a period of 24 months from the date the record is produced.

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<sup>148</sup> Approximately 60 percent of all telemarketing complaints received by NCL involve prize offers, while investment opportunities account for the greatest dollar volume of losses reported. NCL at 49-51.

<sup>149</sup> Initially proposed Rule Section 310.4(f).

<sup>150</sup> APAC at 7; DMA at 34; MSSC at 24-25; Spiegel at 6; Monex at 19; NRF at 38-39.

<sup>151</sup> AARP at 22; NACAA at 5 (apply it to state orders as well); GA OCA at 2.

Many industry commenters stated that the 24-month retention period was burdensome and suggested that the period be shortened.<sup>152</sup> Others suggested that the recordkeeping provision be dropped altogether because Congress did not mandate that records be kept,<sup>153</sup> and because fraudulent telemarketers will most likely ignore the requirements. Those commenters suggested that recordkeeping requirements would only burden legitimate business.<sup>154</sup> On the other hand, law enforcement and consumer representatives commented that the recordkeeping provisions would be extremely helpful in preserving evidence of compliance, in identifying customers who may have been injured, and in identifying persons who might have been involved in any deceptive or abusive telemarketing practices.<sup>155</sup> In fact, several commenters suggested that the record retention period be lengthened to 36 months, which would parallel the IRS retention requirements.<sup>156</sup>

After careful consideration of the comments, the Commission has decided to keep a recordkeeping requirement in the revised proposed Rule. Without the required records, it would be difficult to ensure that sellers and telemarketers are complying with the requirements of the revised proposed Rule, or identify persons who are involved in the practices, or identify customers who may have been injured.

The Commission also has decided to leave the record retention period at 24 months in the revised proposed Rule. A record retention period shorter than a two-year period would be inadequate for the Commission and the States to complete investigations of noncompliance. Consumers who complain to an agency about alleged deceptive or abusive telemarketing practices often do not do so immediately. Therefore, there may already be a substantial "lag time" between the time the alleged violations occur and the time the Commission learns of the alleged violations. A two-year record retention period allows the Commission and State law enforcement agencies to gather information needed to pursue enforcement actions and to identify

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<sup>152</sup> See, e.g., DMA at 35; ANA at 24; IBM at 27; Olan at 14; NRF at 40; MSSC at 25; Ann Arbor at 2.

<sup>153</sup> Section 3(a)(3) of the Telemarketing Act authorizes the Commission to include recordkeeping requirements in the Rule. 15 U.S.C. 6102(a)(3).

<sup>154</sup> See, e.g., RPI at 1; BSA at 14.

<sup>155</sup> See, e.g., NCL at 54; USPS at 24; AARP at 23; NAAG at 36; CFA at 6.

<sup>156</sup> See, e.g., NAAG at 36-37; CFA at 6.

those persons who have most recently suffered injury from the alleged deceptive or abusive telemarketing practices.

The Commission is mindful, however, of the burden on business in maintaining these records. Therefore, the revised proposed Rule incorporates many of the suggestions from industry on how to minimize the recordkeeping burden.

First, the revised proposed Rule specifies that the records may be kept "in any form." This language addresses the suggestions from many commenters that the burden could be reduced if the sellers and telemarketers could keep the required records in electronic storage.<sup>157</sup>

Second, the revised proposed Rule specifies that sellers and telemarketers need to retain only substantially different advertising, brochures, telemarketing scripts, and promotional materials. Several commenters proposed this change in order to reduce the paper burden of maintaining large quantities of virtually identical documents.<sup>158</sup>

Third, the revised proposed Rule incorporates the suggestions of many commenters by requiring sellers and telemarketers to maintain a record only of the last known address of prize recipients, customers, and of current and former employees.<sup>159</sup>

Fourth, the revised proposed Rule sets a de minimis amount of \$25 for record retention on prizes, as was suggested by at least one commenter.<sup>160</sup> Sellers and telemarketers will not have to maintain records on prize recipients and prizes awarded for prizes that have a value less than \$25.00.

Fifth, the revised proposed Rule adds the requirement that sellers and telemarketers maintain a record of any fictitious name used by any current or former employee directly involved in telemarketing sales. This requirement would prevent deceptive telemarketers from hiding behind a fictitious identity and would aid law enforcement agencies in identifying possible defendants.

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<sup>157</sup> See, e.g., ANA at 24; NRF at 40; Olan at 14; NCL at 54; IBM at 27-28; USPS at 24.

<sup>158</sup> See, e.g., DMA at 35; Tr. at 761, 767, and 769.

<sup>159</sup> See, e.g., ATA at 9-10; NRF at 40; Olan at 14; SCIC at 6; IBM at 27.

<sup>160</sup> See ARDA at 36-37.

Some commenters requested clarification of certain recordkeeping requirements in order to reduce the burden on business. For example, several parties read the recordkeeping requirements to require them to maintain records of all customer contacts, regardless of whether the customer actually made a purchase.<sup>161</sup> They recommended that businesses only be required to maintain records relating to customers who actually made a purchase of goods or services. The Commission did not add clarifying language addressing this concern because it believes that the plain language in Section 310.5(a)(3) of the revised proposed Rule is sufficiently clear that only records relating to actual sales need be maintained. That Section specifically requires information to be maintained regarding the sales transaction: the identity of the goods or services purchased, the fulfillment, and the amount paid by the customer.

Other commenters asked that, in connection with the requirement to maintain employee records, the revised proposed Rule more clearly define who is "directly involved in telephone sales" in order to minimize the burden of maintaining records on employees who might be only tangentially involved in telemarketing activities.<sup>162</sup> In addition, some commenters asked that the Commission clarify that records on former employees be kept only on those persons who are employees on or after the effective date of the final Rule.<sup>163</sup>

The revised proposed Rule does not add clarifying language addressing these concerns. The Commission believes that the Rule is sufficiently clear about the types of telemarketing activities that would be subject to the Rule's provisions as to minimize the number and type of employees on whom records must be maintained. In addition, the Commission intends that any Rule requirements, including recordkeeping requirements, will commence with the effective date of the final Rule. Therefore, any records relating to employees and former employees would be required only for those persons who are or become employees or former employees on or after the effective date of the Rule.

The revised proposed Rule incorporates suggestions from some commenters to clarify that the seller and telemarketer need not duplicate those records that are already maintained in the ordinary course of business.<sup>164</sup> Additionally, Section 310.5(c) of the revised Rule permits a seller and telemarketer to allocate

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<sup>161</sup> See, e.g., Wachovia at 3; ARDA at 37; IBM at 27.

<sup>162</sup> See, e.g., DMA at 35-36; ARDA at 37.

<sup>163</sup> See, e.g., NB at 5; Citicorp at 9; ARDA at 37.

<sup>164</sup> See, e.g., Comcast at 6.

between themselves, by written agreement, responsibility for complying with the recordkeeping requirements. The revised proposed Rule further clarifies a seller's and a telemarketer's recordkeeping responsibilities. Under revised Section 310.5(d), absent a written agreement described in Section 310.5(c), a seller is responsible for complying with Sections 310.5(a)(1)-(3) and a telemarketer is responsible for complying with Section 310.5(a)(4). Revised Section 310.5(d) allows sellers and telemarketers to keep the required records in any manner, format, or place as they keep such records in the ordinary course of business.

Several commenters expressed concern that sellers and telemarketers may not have access to all of the information required to be maintained, and requested that the Rule set out which parties should have responsibility for maintaining certain types of records.<sup>165</sup> After considering these comments, the Commission has determined that the language in Section 310.5(b) is already sufficiently clear to convey that the parties may enter into a written agreement allocating responsibility for maintaining records. Thus, there is nothing in Section 310.5(b) that would prohibit the parties from maintaining only those records to which they would normally have access, as long as each of the required types of information is maintained by at least one of the parties. Indeed, several commenters supported this Section, noting that it strikes a reasonable balance between maintaining necessary documentation and avoiding overly burdensome requirements, as well as noting that it is consistent with the contractual nature of the relationship between sellers and telemarketers.<sup>166</sup>

Finally, the Commission has deleted former Section 310.5(a)(5) that required that "any written notices, disclosures, and acknowledgements required to be provided or received under this Rule" be kept. The Commission deleted this Section because the revised proposed Rule no longer requires specific written disclosures and acknowledgements.

#### **Section 310.6 Exemptions**

Section 310.6 of the initially proposed Rule exempts certain acts or practices from the Rule's provisions. This Section prompted considerable comment.

Law enforcement and consumer groups cautioned against any exemptions because of the additional burden of proof exemptions place on law enforcement and because of the potential danger that

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<sup>165</sup> See, e.g., MPA at 25; DSA at 21; OPC at 4.

<sup>166</sup> See, e.g., NRF at 41; ARDA at 37-38.

deceptive telemarketers will seize upon any perceived loophole to avoid coverage under the Rule.<sup>167</sup> At the workshop conference, DSA-Nev. explained Nevada's negative experience with legislative exemptions. DSA-Nev. stated that Nevada's telemarketing legislation exempted charitable solicitations. Shortly after its enactment, Nevada saw fraudulent telemarketers rushing to switch their operations to fraudulent "telefunding" in order to take advantage of that exemption.<sup>168</sup>

The business community, however, suggested that the Commission formulate exemptions that specifically differentiate between deceptive and legitimate telemarketing because of the broad coverage of the initially proposed Rule.<sup>169</sup> Industry suggested that the Commission take one or both of the following courses: (1) narrow the definition of "telemarketing" to include only outbound telephone calls;<sup>170</sup> or (2) if the Commission decides to continue including inbound telephone calls, set forth additional exemptions that would allow the legitimate telemarketing industry to operate without the restraints of additional regulation.<sup>171</sup>

After careful consideration, the Commission has decided that narrowly-tailored exemptions are necessary to avoid unduly burdening legitimate businesses and sales transactions that Congress specifically intended not to cover under the Rule. Section 310.6 enumerates these exemptions. The Commission determined the advisability of each exemption after considering the following factors: (1) whether the conduct or business in question already is regulated extensively by Federal or State law; (2) whether Congress intended that a certain type of telemarketing activity be exempt under the Rule; (3) whether, based on the Commission's enforcement experience, the conduct or business lends itself easily to deception or abuse; and (4) whether requiring businesses to comply with the Rule would be unduly burdensome when weighed against the likelihood that deceptive sellers or telemarketers would use an exemption to circumvent the Rule's coverage.

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<sup>167</sup> See, e.g., NCL at 54-55; NAAG at 37. See also Tr. at 254-256, 704, and 725.

<sup>168</sup> Tr. at 82-84.

<sup>169</sup> See, e.g., NRF at 9; Time Warner at 4-7; DMA at 10-12. See also Tr. at 79-81, 702-703, and 710-711.

<sup>170</sup> See, e.g., MPA at 8-10; MSSC at 9-10; Olan at 19-20; ANA at 10; ACRA at 6-7.

<sup>171</sup> See, e.g., NRF at 20-21; ICTA at 31-35; Time Warner at 28.



The revised proposed Rule incorporates the suggestions of numerous commenters and exempts transactions that are subject to extensive requirements under other Commission rules.<sup>172</sup> Section 310.6(a) exempts pay-per-call services subject to the FTC's 900 Number Rule.<sup>173</sup> Additionally, the Commission has clarified the definition of "investment opportunity" in Section 310.2(j) of the revised proposed Rule to expressly state that the term does not include sales of franchises subject to the FTC's Franchise Rule.<sup>174</sup>

Many commenters suggested exemptions based on other FTC rules, statutes, and regulations, for example, the Negative Option Rule, 16 CFR Part 425, FDCPA, 15 U.S.C. 1692, and the TILA, 15 U.S.C. 1601 et seq.)<sup>175</sup> The Commission believes that changing the phrase "induce payment" to "induce purchase" in the definition of "telemarketing" clarifies that debt collection practices are not covered by this Rule. With regard to credit statutes such as the TILA and the Consumer Leasing Act ["CLA"], 15 U.S.C. 1667, the Commission believes that the revised proposed Rule's disclosure requirements do not conflict or overlap with those statutes. It is therefore unnecessary to specifically exempt transactions subject to the TILA and CLA from the provisions of this Rule. Similarly, the Commission believes that the disclosure provisions of the Negative Option Rule do not conflict or overlap with the provisions of this Rule and therefore there is no need to exempt those transactions.

Other commenters asked that the Commission exempt those entities that are not subject to the FTC Act.<sup>176</sup> The revised proposed Rule has added language to Section 310.1 that clarifies the scope of the Rule in accordance with those comments. Many of these commenters, however, also asked that agents of exempt entities or of entities engaging in exempt activities similarly

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<sup>172</sup> See, e.g., IFA at 4; Time Warner at 44-45; CHC at 7; ISA at 20-27; PMAA at 34-38.

<sup>173</sup> "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308.

<sup>174</sup> "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436.

<sup>175</sup> See, e.g., BOB at 2; ANA at 14; ABA at 3; ACA at 1; Advanta at 2; MBNA at 1.

<sup>176</sup> See, e.g., GHAA at 3; AT&T at 6-13; AmEx at 3; ABA at 1; BOB at 1; ASAE at 2; SCIC at 7.

be exempted from the Rule's provisions.<sup>177</sup> The Commission rejects such an extension. Exemptions under the FTC Act are either based on "status," or a specific activity.<sup>178</sup> Exempting agents is contrary to the Commission's assertion of its jurisdiction under established case law. This Rule will cover sellers and telemarketers who do not fall within those status or activity-based exemptions of the FTC Act. Moreover, the Commission's decision is consistent with Congressional intent that the Telemarketing Act neither expand nor contract the Commission's authority.<sup>179</sup>

Section 310.6(b) of the revised proposed Rule exempts "telephone calls in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller during which the customer has the opportunity to examine the goods or services offered." In addition to Congress' clear intent not to cover such transactions,<sup>180</sup> numerous commenters explained how face-to-face sales are not the type of telemarketing transactions that Congress was concerned about in passing the Telemarketing Act.<sup>181</sup> The Commission agrees that such face-to-face contacts where consumers have the opportunity to examine the goods or services should be exempt under the Rule. This exemption also applies to telephone contacts made subsequent to a face-to-face sales presentation to the extent such contacts are for the sole purpose of consummating the sale of goods or services that the customer had the opportunity to examine.

Section 310.6(c) of the revised proposed Rule exempts telephone calls initiated by a customer that are not the result of any solicitation by the seller or telemarketer. The Commission added this exemption to address many commenters' concerns that the definition of telemarketing might include an

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<sup>177</sup> See, e.g., ABA at 1; Advanta at 1; Chase at 2; Citicorp at 3; NFN at 2.

<sup>178</sup> See 15 U.S.C. 44 and 45(a)(2). For examples of status exemptions, see FTC v. Green Tree Acceptance Corp., No. CA-4-86-469-K, slip op. (N.D. Tx. Sep. 30, 1987); Official Airlines Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); FTC v. Miller, 549 F.2d 452 (7th Cir. 1977); Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972). For an example of an activity exemption, see Community Blood Bank of Kansas City, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969).

<sup>179</sup> See Senate Report at 14.

<sup>180</sup> House Report at 7; Senate Report at 7-8.

<sup>181</sup> See, e.g., DSA.

inbound call from a customer to make hotel, airline, car rental or similar reservations, to place carry-out or restaurant delivery orders, obtain information or customer technical support, or other incidental uses of the telephone that were not in response to a direct solicitation.<sup>182</sup> This exemption is consistent with Congress' intent not to cover transactions involving incidental use of the telephone.<sup>183</sup>

The Commission has replaced former Section 310.6(c) with revised Sections 310.6(d) and (e). Section 310.6(c) of the initially proposed Rule had exempted telephone contacts made by a person "when there has been no initial sales contact directed to that particular person, by telephone or otherwise, from the seller or telemarketer." Many commenters expressed confusion over what was meant by "initial sales contact" or "directed to that particular person," and requested that the Commission clarify the scope of this exemption.<sup>184</sup> The Commission agrees that clarification is needed as to the scope of this exemption. Revised proposed Sections 310.6(d) and (e) now treat separately calls prompted by advertisements in any media, other than direct mail solicitations, and calls prompted by direct mail solicitations. Revised Section 310.6(d) exempts "telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations; provided, however, that this exemption does not apply to calls initiated by a customer in response to an advertisement relating to investment opportunities, goods or services described in Sections 310.4(a)(2)-(3), or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit." The revised language of Section 310.5(d) addresses some commenters' concerns that calls in response to television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising would be covered by the Rule.<sup>185</sup> The Commission does not intend that telephone contacts in response to general media advertising be covered under the Rule. Rather, deceptive general media advertising will continue to be subject to enforcement actions under the FTC Act.

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<sup>182</sup> See, e.g., ACRA at 6; DSA at 5; Olan at 19-20; Viacom at 6-7; MCI at 5-6.

<sup>183</sup> Senate Report at 8.

<sup>184</sup> See, e.g., ANA at 10-11; Viacom at 6-7; Olan at 27; AFSA at 3-4; QVC at 13-14; DMA at 37; MPA at 9; Time Warner at 26-27.

<sup>185</sup> See, e.g., INTV at 4; QVC at 2-3; NAA at 10-12; ANA at 10-11.

On the other hand, the Commission knows that some fraudulent sellers and telemarketers use mass media or general advertising to entice their victims to call, particularly in relation to the sale of investment opportunities, specific credit-related programs, and recovery rooms. Given the Commission's experience with these fraudulent telemarketing schemes being marketed through television commercials, infomercials, magazine and newspaper advertisements, and other forms of mass media advertising, the Commission has excluded these activities from the general media advertising exemption.

The revised proposed Rule no longer excludes "prize promotions" from the general media exemption because the Commission believes that the majority of fraudulent prize promotions do not employ mass media or general advertising. In addition, the revised proposed Rule has dropped "employment services" as one of the exceptions to the general media exemption. Although the Commission and other law enforcement agencies have brought actions against advance fee employment services that use mass media advertising, many legitimate employment services use the same type of mass media advertising and also require advance fees. The Commission believes that neither the legislative history of the Telemarketing Act nor the rulemaking record for the Rule provide a sufficient basis for singling out the employment service industry for an exception to the general media advertising exemption. Deceptive employment opportunity advertising will, however, still be subject to enforcement actions under the FTC Act.

Section 310.6(e) exempts telephone calls initiated by a customer in response to "a direct mail solicitation that clearly and conspicuously discloses all material information listed in Section 310.3(a)(1) of this Rule for any item offered in the direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to investment opportunities, goods or services described in Sections 310.4(a)(2)-(3), or direct mail solicitations that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit." Some commenters suggested that the Commission include under the general media exemption all direct mail solicitations -- which, in effect, would have excluded all inbound calls from coverage under the Rule. However, the Commission's enforcement experience demonstrates that deceptive telemarketers frequently use direct mail solicitations as an integral part of their fraudulent schemes. Inbound calls prompted by such solicitations frequently result in the caller being subjected to the deceptive practices the Telemarketing Act is designed to address. Therefore, the Commission has determined that including all direct mail solicitations within the general media exemption is unworkable. The Commission acknowledges,

however, that most direct mail solicitations are not deceptive. In particular, the likelihood of deception is greatly diminished when direct mail solicitations contain all material information about the offered goods or services. Revised Section 310.6(e) therefore exempts only those direct mail solicitations that disclose, clearly and conspicuously, all the information specified in Section 310.3(a)(1) as material to a person's purchase decision. As in the general media exemption, revised Section 310.6(e) excludes from this exemption direct mail solicitations relating to investment opportunities, specific credit-related programs, and recovery rooms because of the Commission's enforcement experience in these areas.

The Commission decided to delete the "de minimis" exemption for incidental telemarketing activity contained in former Section 310.6(a). Comments indicate that neither the law enforcement nor the business communities found such an exemption helpful or workable. Law enforcement agencies believed that the exemption would hamper quick law enforcement, while providing a loophole for fraudulent telemarketers who specialize in high-price scams directed at only a few victims.<sup>186</sup> The business community found the exemption to be so restrictive that it would be of little significance.<sup>187</sup> The Commission agrees with those observations and believes that revisions made elsewhere in the revised proposed Rule, including exemptions in Section 310.6, eliminate the need for this specific exemption.

Comments about the initially proposed "business-to-business" exemption<sup>188</sup> fell to opposite extremes. Several industry commenters asked that the exemption be expanded to include entities other than businesses.<sup>189</sup> Other commenters asked that the Commission clarify the type of office supplies excluded from the exemption.<sup>190</sup> Still other industry commenters suggested that a "business-to-business" exemption was only defensible if provided on an across-the-board basis, without exceptions.<sup>191</sup> On the other hand, law enforcement and consumer agencies urged the

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<sup>186</sup> See, e.g., NYSCPB at 13; NACAA at 6; NAAG at 38-40; IA DOJ at 21.

<sup>187</sup> See, e.g., DMA at 36; Olan at 27; ICTA at 57; AAAA at 6.

<sup>188</sup> Initially proposed Rule Section 310.6(b).

<sup>189</sup> See, e.g., Viacom at 9.

<sup>190</sup> See, e.g., IBM at 28; BPIA at 4.

<sup>191</sup> See DMA at 36-37.

Commission to exclude additional goods or services from the business-to-business exemption.<sup>192</sup>

Because the Commission has extensive enforcement experience pertaining to deceptive telemarketing directed to businesses, it does not believe that an across-the-board exemption for business-to-business contacts is appropriate. The Commission does agree, however, that clarification of the goods or services that are excluded from this exemption is necessary. Revised Section 310.6(f) states that only the retail sale of nondurable office or cleaning supplies are excluded from the exemption.<sup>193</sup>

Many commenters suggested an exemption for transactions where the customer is able to examine the goods or services before paying for them but does not involve a face-to-face sales presentation.<sup>194</sup> The Commission does not believe such an exemption is necessary, given the changes elsewhere in the revised proposed Rule, as noted above.

Many commenters suggested an exemption based on a prior business relationship with the customer.<sup>195</sup> The Commission does not believe that such an exemption would be workable in the context of telemarketing fraud. A fraudulent telemarketer need only obtain an initial purchase from an unsuspecting victim to claim a "prior business relationship" exemption.

In addition, many commenters suggested an exemption for "established businesses," including businesses that offer basic customer protection policies such as a moneyback guarantee.<sup>196</sup> The Commission agrees with the comments of other law enforcement agencies that such broad-based "safe harbor" provisions are not appropriate.<sup>197</sup>

Such a "safe harbor" or "established business" exemption might have an anticompetitive effect on new businesses entering the market. In addition, the experience of law enforcement

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<sup>192</sup> See NAAG at 41; ID AG at 2; USPS at 25.

<sup>193</sup> See, e.g., IBM at 28; BPIA at 4.

<sup>194</sup> See, e.g., CHC at 8, 12.

<sup>195</sup> See, e.g., ARDA at 39; ACRA at 9-10; MSSC at 27; Time Warner at 44; ADC at 2; DMA at 38.

<sup>196</sup> See, e.g., Time Warner at 23-26; DMA at 38; AmEx at 2; APAC at 1-2, 6; Viacom at 6; Olan at 28; ACRA at 10; ARDA at 40; NRF at 17-18.

<sup>197</sup> See, e.g., Tr. at 705-26.

agencies indicates that much telemarketing fraud is perpetrated by so-called "established businesses." Furthermore, the existence of policies such as a moneyback guarantee is no assurance that the company is not fraudulent. Law enforcement agencies are well aware that fraudulent telemarketers often tout their "moneyback guarantees" and refund policies as part of the sales solicitation. Unfortunately, such companies rarely honor those moneyback guarantees.

Therefore, the Commission has decided not to include a broad "safe harbor" or "established business" exemption in the revised proposed Rule. The Commission believes that changes made elsewhere in the revised proposed Rule, including exemptions set forth in Section 310.6, obviate the need for such an exemption or safe harbor.

#### *Section 310.7 Actions by States and Private Persons*

The Telemarketing Act permits certain State officials and private persons to bring civil actions in an appropriate Federal district court for violations of this Rule.<sup>198</sup> Section 310.7 of the initially proposed Rule set forth the notice such parties must provide to the Commission concerning those actions. The language regarding the notice has not changed in the revised proposed Rule. However, the revised proposed Rule has added Section 310.7(b), which clarifies that the Rule does not vest State officials or private persons with jurisdiction over any person or activity outside the jurisdiction of the FTC Act.

The Commission added this language in response to questions from a number of commenters regarding the scope of the Rule and the authority to bring actions for violations of the Rule.<sup>199</sup> When coupled with the new language in section 310.1 on the scope of the Rule, the language in Section 310.7(b) clarifies that the Rule does not apply to any person outside the jurisdiction of the FTC Act, and that neither the Commission nor any other party authorized to bring suit for violations of the Rule may bring an action against such persons.

This restriction on the scope of the Rule and authority to bring actions under the Rule tracks Section 6(b) of the Telemarketing Act: "[N]o activity which is outside the jurisdiction of [the FTC] Act shall be affected by this Act."<sup>200</sup> The language also is consistent with the legislative history of the Telemarketing Act and reflects the intent of Congress:

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<sup>198</sup> See 15 U.S.C. 6103 and 6104.

<sup>199</sup> See, e.g., AARP at 3; ABA at 1; BOB at 2.

<sup>200</sup> 15 U.S.C. 6105(b).

[T]he legislation . . . does not vest the FTC, the State attorneys general, or private parties with jurisdiction over any person over whom the FTC does not otherwise have authority.<sup>201</sup>

#### Section 310.8 Federal Preemption

Section 310.8 of the initially proposed Rule stated that nothing in the Rule shall be construed to preempt any State law that is not in direct conflict with any provision of the Rule. Several commenters asked that this Section clarify that the Rule establishes a threshold requirement that State laws can exceed as long as they do not conflict with the Rule's requirements.<sup>202</sup> At least one commenter expressed concern that they would be subject to making State-required disclosures that are similar to the Rule's requirements but not directly in conflict.<sup>203</sup>

The Commission does not believe any changes are necessary to this Section. The language in this Section is clear and provides sufficient guidance that additional State requirements and prohibitions would be permitted as long as they do not conflict directly with the Rule. Thus, State registration, certification, or licensing requirements for telemarketing most likely would not be preempted because they would not be in direct conflict with any provisions of this Rule.

#### Effective Date

The NPR asked for comments on whether 30 days would provide sufficient time to come into compliance with the initially proposed Rule provisions.<sup>204</sup> Most of the parties who commented on the effective date indicated that 30 days would be insufficient given the need "to make system changes, establish training programs [for] employees involved in telephone sales . . . , develop new recordkeeping procedures, prepare written disclosure and acknowledgement forms, draft and negotiate new contracts with service bureaus, [and] develop internal monitoring programs."<sup>205</sup> Most of the commenters who believed 30 days was

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<sup>201</sup> Senate Report at 14.

<sup>202</sup> See, e.g., AARP at 25; NYSCPB at 13-14; NAAG at 41-42; NACAA at 6.

<sup>203</sup> See Prudential at 4.

<sup>204</sup> 60 FR at 8328.

<sup>205</sup> NRF at 41. See also APAC at 9; NCL at 55; Olan at 29; NAA at 24; DMA at 40; SCIC at 71; ARDA at 41; Time Warner at 41. But see USPS at 26.



insufficient suggested a 6-month time frame in order to achieve compliance.<sup>206</sup> NCL noted that some of the prohibited deceptive and fraudulent practices could be instituted immediately (for example, the prohibitions against misrepresentations), but that industry might need additional time to comply with certain other requirements of the initially proposed Rule.<sup>207</sup>

Because the revised proposed Rule eliminates many of the disclosure requirements that generated the foregoing compliance time predictions, the Commission proposes to set the effective date at 30 days from the date the final Rule is published. Thirty days should not unduly burden legitimate industry because, based on information provided by industry, legitimate sellers and telemarketers already comply with the revised proposed Rule. For example, legitimate industry represented that it already makes the affirmative disclosures required under Section 310.3(a)(1); it does not misrepresent material information pertaining to the sale of goods or services prohibited under Section 310.3(a)(2); it does not knowingly provide substantial assistance or support to deceptive sellers or telemarketers prohibited under Section 310.3(b); and it does not engage in credit card laundering prohibited under Section 310.3(c). Further, telemarketers have been required to comply with the TCPA since 1992 and should already have in place and be implementing the "do not call" procedures required under that Act. Such procedures therefore would comply with Section 310.4(b)(2) of this Rule, as well. Finally, the Commission understands from the workshop that participants already maintain the records required under Section 310.5. Because the Commission does not require that records be kept in any special form, legitimate industry is most likely already in compliance with Section 310.5 of the Rule. Based on the foregoing, the Commission does not believe that a further delayed effective date for the Rule is reasonable.

#### **Section C. Invitation to Comment**

Before adopting this revised proposed Rule as final, consideration will be given to any written comments submitted to the Secretary of the Commission on or before June 30, 1995. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations, on normal business days between the hours of 8:30 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

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<sup>206</sup> See, e.g., DMA at 40; Olan at 29; NRF at 41; SCIC at 7; Time Warner at 41.

<sup>207</sup> NCL at 55.

#### **Section D. Communications by Outside Parties to Commissioners or Their Advisors**

Pursuant to Commission Rule 1.26(b)(5), communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor during the course of this rulemaking shall be subject to the following treatment. Written communications, including written communications from members of Congress, shall be forwarded promptly to the Secretary for placement on the public record. Oral communications, not including oral communications from members of Congress, are permitted only when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications. Oral communications from members of Congress shall be transcribed or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and promptly placed on the public record, together with any written communications and summaries of any oral communications relating to such oral communications.

#### **Section E. Regulatory Flexibility Act**

During the comment period, only a few commenters<sup>208</sup> asserted that the initially proposed Rule might have a significant economic impact on a substantial number of small entities. However, based on the revised proposed Rule's modified regulatory approach, the provisions of the Regulatory Flexibility Act relating to an initial and final regulatory analysis, 5 U.S.C. 603, 604, are not applicable to this document because it is believed that these revised regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities, 5 U.S.C. 605.

The Telemarketing Act requires the Commission to issue regulations, not later than 365 days after the date of enactment, prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices. The Act limits the scope of the regulations to entities that engage in telemarketing through one or more interstate telephone calls; telemarketing sales by local companies to local customers would most likely be intrastate calls and thus outside the parameters of the proposed rule. The Act also exempts certain catalog sales operations from the scope of the regulations. In addition, the revised proposed rule exempts pay-per-call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and

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<sup>208</sup> See generally Olan; ATFA; ANA; ABA.

Dispute Resolution Act of 1992," exempts telephone calls in which a payment is not required until after a face-to-face sales presentation has occurred, telephone calls initiated by a customer that are not in response to any solicitation, and customer telephone calls that are in response to mass media advertising.

As a result of these statutory and regulatory limitations, the Commission believes that many small entities will fall outside the scope of the regulations. In addition, any economic costs imposed on small entities remaining within the parameters of the rule are, in many instances, specifically imposed by statute. Where they are not, efforts have been made to make the revised proposed Rule's requirements flexible, in part to minimize any unforeseen burden on small entities, as described elsewhere in this notice.

To ensure that no substantial economic impact is being overlooked, public comment is requested on the effect of the proposed regulations on the costs to, profitability and competitiveness of, and employment in small entities. Subsequent to the receipt of public comments, it will be decided whether the preparation of a final regulatory flexibility analysis is warranted. Accordingly, based on available information, the Commission hereby certifies under the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed regulations will not have a significant economic impact on a substantial number of small entities. This notice serves as certification to that effect for the purposes of the Small Business Administration.

#### **List of Subjects in 16 CFR Part 310**

Telemarketing, Trade practices

Accordingly, it is proposed that chapter I of 16 CFR be amended by adding a new part 310 to read as follows:

#### **PART 310: TELEMARKETING SALES RULE**

Sec.

- 310.1 Scope of regulations in this part.
- 310.2 Definitions.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by states and private persons.
- 310.8 Federal preemption.
- 310.9 Severability.

Authority: 15 U.S.C. 6101-6108.

**§ 310.1 Scope of regulations in this part.**

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108. This part does not apply to any activity outside the jurisdiction of the Federal Trade Commission Act, 15 U.S.C. 41, et seq.

**§ 310.2 Definitions.**

- (a) Acquirer means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.
- (b) Attorney general means the chief legal officer of a State.
- (c) Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.
- (d) Commission means the Federal Trade Commission.
- (e) Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
- (f) Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.
- (g) Credit card sales draft means any record or evidence of a credit card transaction.
- (h) Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.
- (i) Customer means any person who is or may be required to pay for goods or services offered through telemarketing.
- (j) Investment opportunity means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation. The term "investment opportunity" does not include sales of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR Part 436.

- (k) Material means likely to affect a person's choice of, or conduct regarding, goods or services.
- (l) Merchant means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services.
- (m) Merchant agreement means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services.
- (n) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services.
- (o) Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.
- (p) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.
- (q) Prize promotion means:
  - (1) A sweepstakes or other game of chance; or
  - (2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.
- (r) Seller means any person who, in connection with a telemarketing transaction, provides or offers to provide goods or services to the customer in exchange for consideration.
- (s) State means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.
- (t) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.
- (u) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of

the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

**§ 310.3 Deceptive telemarketing acts or practices.**

**(a) Prohibited deceptive telemarketing acts or practices.**

It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

- (1) Before a customer pays for goods or services offered, failing to disclose, in a clear and conspicuous manner, the following material information:
  - (i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;
  - (ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;
  - (iii) All material terms and conditions of the seller's refund, cancellation, exchange, or repurchase policies if a representation about any such policy is made a part of the sales offer; and
  - (iv) That no purchase is necessary to win if a prize promotion is offered in conjunction with a sales offer of goods or services;
- (2) Misrepresenting, directly or by implication, any of the following material information:
  - (i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

- (ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;
  - (iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;
  - (iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;
  - (v) Any material aspect of a prize promotion including, but not limited to, the odds of winning, the nature or value of a prize, or that payment is required to receive a prize;
  - (vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability; or
  - (vii) A seller's or telemarketer's affiliation with, or endorsement by, any government or third-party organization; and
- (3) Making a false or misleading statement to induce any person to pay for goods or services.
- (b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a) or (c), or § 310.4 of this Rule, and such substantial assistance is related to the commission or furtherance of that act or practice.
- (c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice, and a violation of this Rule, for:
- (1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

- (2) Any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or
- (3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

**§ 310.4 Abusive telemarketing acts or practices.**

- (a) **Abusive conduct generally.** It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

- (1) Threats, intimidation, or the use of profane or obscene language;
- (2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:
  - (i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and
  - (ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;
- (3) Requesting or receiving payment of any fee or consideration from a person, for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This



provision shall not apply to goods or services provided to a person by a licensed attorney; or

- (4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person.
- (b) **Pattern of calls.** (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:
  - (i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number; or
  - (ii) Initiating an outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.
- (2) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) if:
  - (i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii);
  - (ii) It has trained its personnel in the procedures established pursuant to § 310.4(b)(2)(i);
  - (iii) The seller, or the telemarketer acting on behalf of the seller, has maintained and recorded lists of persons who may not be contacted, in compliance with § 310.4(b)(1)(ii); and
  - (iv) Any subsequent call is the result of error.
- (c) **Calling time restrictions.** Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.
- (d) **Required oral disclosures.** It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call to fail to